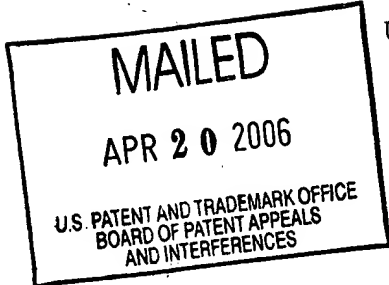


The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.



UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ART MALIN, DONALD L. VAN ERDEN,
JAMES G. KOHL, JR. and MICHAEL J. MCMAHON

Appeal No. 2006-0218
Application No. 09/480,061

ON BRIEF

Before MCQUADE CRAWFORD and BAHR, Administrative Patent Judges.
MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Art Malin et al. appeal from the final rejection (mailed January 12, 2005) of claims 14 and 16, the only claims pending in the application.

THE INVENTION

The invention relates to a reclosable plastic bag, commonly known as a zipper bag, used for the packaging and sale of perishable food and like products. Representative claim 14 reads as follows:

14. A reclosable package comprising:

a first wall and a second wall opposite said first wall;

a zipper strip for selectively opening and closing said package, said zipper strip comprising a male interlocking profile extending along an internal surface of said first wall and a female interlocking profile extending along an internal surface of said second wall;

said male interlocking profile having a male interlocking member and a male web integral therewith;

said female interlocking profile having a female interlocking member and a female web integral therewith, said male interlocking member being engageable within said female interlocking member to join said male and female interlocking profiles together;

wherein one of said male and female webs is wider than the other of said male and female webs in at least one of two directions from said male and female interlocking members, the greater width of the wider of said male and female webs being at least one flange extending widthwise beyond the other of said male and female webs;

wherein said at least one flange of one interlocking profile is sealed to said first and second walls at a first seal area spaced apart widthwise from said interlocking members on a first widthwise side of said interlocking members;

wherein the other interlocking profile is sealed to the second wall at a second seal area spaced apart widthwise from said interlocking members and separated from said first seal area by the joined thickness of said interlocking profiles along the length of said zipper strip, said second seal area being on said first widthwise side of said interlocking members; and

wherein said package includes sealed ends formed from said first and second walls extending in the direction as said zipper thereby forming a top and a bottom of said package and wherein one of said walls further includes a lap or fin seal formed in a central location thereof, said lap or fin seal extending substantially perpendicular to said zipper.

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THE PRIOR ART

The references relied on by the examiner to support the final rejection are:

| | | |
|---|-----------|---------------|
| Uramoto | Re.33,674 | Aug. 27, 1991 |
| May et al. (May) | 5,660,479 | Aug. 26, 1997 |
| Japanese Patent Document | 62-273839 | Nov. 27, 1987 |
| Yeager, Published International Application | 97/06062 | Feb. 20, 1997 |

THE REJECTIONS

Claims 14 and 16 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over May in view of Uramoto.

Claims 14 and 16 also stand rejected under 35 U.S.C. § 103(a) as being unpatentable over May in view of either Yeager or the Japanese reference.

Attention is directed to the brief (filed June 13, 2005) and answer (mailed August 24, 2005) for the respective positions of the appellants and examiner regarding the merits of these

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rejections.^{1,2,3}

DISCUSSION

I. Petitionable matter

The appellants raise as an issue in the appeal the 37 CFR § 1.83(a) objection to the drawings made in the final rejection (see page 5 in the brief). The stated basis for the objection shows, however, that it is not directly connected to the merits of any rejection of claims. Hence, the objection is reviewable by petition to the Director rather than appeal to this Board (see In re Hengehold, 440 F.2d 1395, 1403-1404, 169 USPQ 473, 479 (CCPA 1971)), and will not be further addressed in this decision.

II. The 35 U.S.C. § 103(a) rejection of claims 14 and 16 as being unpatentable over May in view of Uramoto

May discloses an easy-to-open package header for a hermetically sealed plastic bag. The header includes opposing

¹ Our understanding of the Japanese reference stems from an English language equivalent, U.S. Patent No. 4,655,862 to Christoff et al., cited by the examiner in the answer (see page 4).

² In the final rejection, claims 14 and 16 also stood rejected under 35 U.S.C. § 112, first paragraph. Upon reconsideration, the examiner has withdrawn this rejection (see page 3 in the answer).

³ The examiner cites U.S. Patent No. 4,759,642 to Van Erden et al. in the answer (see page 6) as "extrinsic evidence" in support of the appealed rejections. This patent, however, does not appear in the statement of either of the rejections on appeal. Where a reference is relied on to support a rejection, whether or not in a minor capacity, there is no excuse for not positively including the reference in the statement of the rejection. See In re Hoch, 428 F.2d 1341, 1342 n.3, 166 USPQ 406, 407 n.3 (CCPA 1970); and MPEP § 706.02(j). Accordingly, we have not considered the teachings of Van Erden et al. in reviewing the merits of the examiner's rejections.

plastic films 12 and 14 which presumably extend downwardly to form the body of the bag. In this regard, May teaches that the top edge of the header "is formed by folding a single film in half to create the opposing films 12 and 14 or by sealing top portions of separate opposing films 12 and 14 together" (column 3, lines 23-26).

For purposes of the appealed rejections, the examiner focuses on the package header embodiment illustrated in Figure 7 of the reference.⁴ In May's words,

FIG. 7 is a sectional view of yet another embodiment of the easy open package header arrangement. As shown in FIG. 7, the package header arrangement comprises opposing films 12 and 14, base strips or support members 42 and 44, tear beads 46 and 48, interlocking [zipper] members 22 and 24, sealant material 26, and one or more die lines 50. In this embodiment the tear beads 46 and 48 replace the tear beads of the previous embodiments. The base strip 42 extends further upward into the top portion of the header arrangement than does the base strip 44. The base strips 42 and 44 are generally rectangular in cross-sectional shape and are substantially composed of a resilient polymeric material such as low-density polyethylene. The base strips 42 and 44 are generally parallel to each other and are positioned between the opposing films 12 and 14 of the header arrangement [column 6, line 61, through column 7, line 10].

As acknowledged by the examiner (see page 4 in the answer), May does not describe the particulars of the hermetically sealed

⁴ Although the examiner also refers to May's Figure 6 in this regard (see pages 4 and 5 in the answer), Figure 6 shows a different and less pertinent package header embodiment.

package outside of the package header, and hence does not respond to the limitations in claim 14 requiring the claimed package to include sealed ends formed from the first and second walls extending in the direction as the zipper and a lap or fin seal formed in a central location of one of the walls and extending substantially perpendicular to the zipper. To account for these deficiencies, the examiner turns to Uramoto.

Uramoto discloses a hermetically sealed plastic bag generally similar to that disclosed by May. Figures 1 and 2 show a rectangular plastic sheet from which the bag is made. The sheet, which carries complementary rib and groove zipper elements 13a and 14a, includes edges 12a and 12b which will eventually form the sides of the bag and edges 12c and 12d which will eventually form the bottom of the bag. As described by Uramoto,

In summary with respect to the sheet structure of FIG. 1, when it is to be formed into the bag 19 of FIG. 2, it is doubled down its center 12e to form a fold for the top of the bag, and the sides 12a and 12b are seamed with the bottom edges 12c and 12d remaining unattached to leave a bottom opening for filling the bag. The rib and groove elements 13a and 14a are pressed together to interlock so that the contents of the bag will not flow past these interlocked elements. When the contents are placed in the bag, a seam is formed along the bottom to join edges 12c and 12d to form a seam 16 as shown in FIG. 3. The bag is then completed for shipping and storage. It is completely hermetically sealed [column 3, lines 3-16].

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Combining May and Uramoto to reject claim 14, the examiner submits that it would have been obvious "to employ the side seals and bottom seal of Uramoto in the bag of May et al to provide a simple way to form the package . . . [and] to provide the hermetic sealed form as required . . . [by] May et al." (answer, page 4). In response to the appellants' contention (see page 6 in the brief) that this proposed combination would not result in a package meeting the limitation in claim 14 requiring one of the walls to include a lap or fin seal formed in a central location thereof and extending substantially perpendicular to the zipper, the examiner contends that the side seals suggested by Uramoto extend through the horizontal center of the walls, have a part that is centrally located on the wall, and overlap so as to satisfy the lap limitation (see page 5 in the answer).

Conceivably, the combined teachings of May and Uramoto would have suggested providing the bag disclosed by May with side seams and a bottom seam as disclosed by Uramoto. As persuasively argued by the appellants, however, such a bag would not respond to the limitation in claim 14 calling for a lap or fin seal formed in a central location of a wall and extending substantially perpendicular to the zipper. The examiner's position that a side seam as described by Uramoto would satisfy

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this limitation rests on an unreasonable interpretation of the claim language in question.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claim 14, and dependent claim 16, as being unpatentable over May in view of Uramoto.

III. The 35 U.S.C. § 103(a) rejection of claims 14 and 16 as being unpatentable over May in view of either Yeager or the Japanese reference

In this rejection, the examiner looks to either Yeager or the Japanese reference to cure the admitted failure of May to meet the lap or fin seal limitation in claim 14.

Each of the secondary references discloses a plastic bag (see Figures 1 and 2 in each reference) having a reclosable zipper (see fastener assembly 26 in Yeager and fastener strip 27 in the Japanese reference), sealed ends extending in the direction of the zipper (see seals 20 and 22 in Yeager and seals 42 in the Japanese reference), and a lap or fin seal (see lap seam 24 in Yeager and fin seal 34 in the Japanese reference) formed in a central location of one of the bag walls and extending substantially perpendicular to the zipper. Each secondary reference also teaches that the bag disclosed therein can be produced by a form, fill and seal machine.

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Combining May and either Yeager or the Japanese reference to reject claim 14, the examiner contends that it would have been obvious

to employ [in the May bags the] central seal and bottom seal of either Yeager or [the Japanese reference] so that the bags could be rapidly formed, filled, and sealed on a FFS (form fill and seal) machine . . . [and] to employ the seals of Yeager or [the Japanese reference] to provide the hermetic [sealed] form as required . . . [by] May et al. [answer, page 5].

The examiner has not cogently explained, however, and it is not evident from the applied prior art, why the bag disclosed by May would need a central seam of the sort taught by either Yeager or the Japanese reference to be produced by a form, fill and seal machine or to be hermetically sealed. Hence, the rationale advanced by the examiner to support the proposed reference combination is somewhat suspect. The examiner also has failed to explain away the seeming inconsistency between the package header disclosed by May, which would appear to be consonant with a side seam construction, and the central seam construction taught by Yeager or the Japanese reference. Given these discrepancies in the examiner's evidentiary showing, the appellants' argument (see page 7 in the brief) that the applied references would not have suggested the combination proposed by the examiner is convincing.

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Consequently, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claim 14, and dependent claim 16, as being unpatentable over May in view of either Yeager or the Japanese reference.

SUMMARY

The decision of the examiner to reject claims 14 and 16 is reversed.

REVERSED

JOHN P. MCQUADE
Administrative Patent Judge

MURRIEL E. CRAWFORD
Administrative Patent Judge

JENNIFER D. BAHR
Administrative Patent Judge

BOARD OF PATENT
APPEALS
AND
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